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Supreme Court, U.S.
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No. 99-1553

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

GREGORY GINDLESPERGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court lacks jurisdiction to review this case because the decision of the Pennsylvania Supreme Court rested on adequate and independent state constitutional grounds, namely the Respondent's protection from unreasonable searches and seizures pursuant to Article I, Section 8 of the Pennsylvania Constitution.

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TABLE OF CITED AUTHORITIES

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Cases:

Commonwealth of Pennsylvania v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) 2, 5, 6

Michigan v. Long, 463 U.S. 1032 (1983) 1, 2, 5, 6

Ohio v. Robinette, 519 U. S. 33 (1996) 5, 6

United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999) 6

Pennsylvania Constitution:

Article I, Section 8 ..... *passim*

United States Constitution:

Fourth Amendment ..... *passim*

ORDERS AND OPINIONS BELOW

Petitioner's Appendix correctly includes the December 22, 1999 Opinion of the Supreme Court of Pennsylvania, and the February 14, 1997 Opinion of the Superior Court of Pennsylvania. It attaches, however, the wrong opinion from the trial court. The trial court opinion attached at App. 56a of Petitioner's Petition is the April 28, 1995 opinion which decided a number of issues other than the constitutionality of law enforcement's warrantless use of a thermal imaging device to scan the Respondent's home. This precise issue, which triggers the question presented to this Court, was discussed and decided in the trial court's January 27, 1995 Opinion and Order, a copy of which is enclosed herewith as a Lodging Appendix.

STATEMENT OF NO JURISDICTION

Michigan v. Long, 463 U.S. 1032 (1983), holds that where a state court opinion is based upon federal law grounds, but also indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate and independent state law, the United States Supreme Court lacks jurisdiction to review the decision. 463 U.S. at 1041. The Petitioner's Statement of Jurisdiction, citing only a portion of one sentence of a footnote in the Pennsylvania Supreme Court's opinion, asserts that the decision of that court "relied solely on Fourth Amendment grounds". A reading of that entire footnote[1] demonstrates the clear error of this assertion. The

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1. We note that Appellee also asserted a state constitutional challenge to law enforcement's warrantless use of the WASP devise to scan his residence before the Superior Court. However, given that the court concluded such use violated the Fourth Amendment, it did not address Appellee's Article I, Section 8 claim, *Gindlesperger*, 706 A.2d at 1224. Appellee, likewise, preserves his state constitutional claim in his brief to this Court. However, given that

(Cont'd)

entire passage, including the state court's statement that in addition to violating the Fourth Amendment, "it is clear that this conduct likewise violates Article I, Section 8" (of the Pennsylvania Constitution) constitutes a plain statement that the decision below rested on adequate and independent state grounds, thus depriving this Court of jurisdiction pursuant to *Long*.

CONSTITUTIONAL PROVISION INVOLVED

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pennsylvania Constitution, Article I, Section 8.

(Cont'd)

the appeal before us was taken by the Commonwealth regarding the Superior Court's disposition, and given that we agree with the Superior Court, we too need not address Appellee's state constitutional challenge since this Court has held that embodied in Article I, Section 8 is a strong notion of privacy which is greater than that of the Fourth Amendment. *See Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 897-898 ("Article I, Section 8 may be employed to guard individual privacy rights against unreasonable searches and seizures more zealously than the federal government . . ."). Thus, given our conclusion that the within conduct violates the Fourth Amendment, it is clear that this conduct likewise violates Article I, Section 8. *Commonwealth v. Gindlesperger*, 1999 WL 1242606, at 2, n.3.

STATEMENT OF THE CASE

The Petitioner seeks review in this Court of the Pennsylvania Supreme Court's affirmance of the order of the intermediate court of appeals in Pennsylvania — the Superior Court — which suppressed the seizure of marijuana plants taken from the Respondent's home and reversed the Respondent's conviction. In its Statement of the Case, the Petitioner omits several significant facts that bear upon the issue of this Court's jurisdiction to review this case. Those matters show that this Court lacks such jurisdiction. The Respondent offers the following as a supplement to the Petitioner's Statement of the Case.

The Respondent filed in the trial court a number of pre-trial motions including one to suppress evidence based upon his claim that the Petitioner's warrantless use of a thermal imagining (WASP) device to detect evidence from inside the underground basement of his home constituted a search in violation of both the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution. Considering the aforementioned federal and state constitutional grounds separately, the trial court denied this suppression motion.

Upon his direct appeal the Respondent challenged this warrantless use of the WASP on both of these federal and state constitutional grounds. *Commonwealth v. Gindlesperger*, 706 A.2d 1216, 1218 (Pa. Super. 1997). The intermediate appellate court reversed the trial court, holding that the warrantless use of the WASP violated the Fourth Amendment and that law enforcement's use of the results of the device to obtain a search warrant for the Respondent's home "was invalid and not a proper basis for issuance of the warrant." *Id.*, 706 A.2d at 1218. That court went on to state:

> "Because we have found the thermal imaging search was violative of the Fourth Amendment, it is not necessary for us to specifically address [Respondent's] contention that the search violated the Pennsylvania Constitution. However, it is well-established that the Pennsylvania Constitution has been held to provide greater privacy protection than the Fourth Amendment." (citations omitted)

Id., 706 A.2d at 1224.

The Petitioner then appealed to the Pennsylvania Supreme Court, and the Respondent preserved there his state constitutional argument. *Commonwealth v. Gindlesperger*, 1999 WL 1242606, at 2 n.3. The Pennsylvania Supreme Court affirmed the Superior Court, specifically holding that the warrantless use of the WASP violated the Fourth Amendment. *Id.* at 20. Accordingly, that court acknowledged that it did not need to address the Respondent's state constitutional claim, but did so anyway by virtue of a clear statement that the Pennsylvania Constitution provided alternative and independent grounds for the same result. *Id.*, at 3 n.3. (". . . it is clear that this conduct likewise violates Article I, Section 8".)

REASONS FOR DENYING THE WRIT

The Petitioner's argue that this Court should take jurisdiction so that it can consider the application of the Fourth Amendment to law enforcement's use of a thermal imaging device to obtain evidence from a home. This argument is unavailing, however, because contrary to the Petitioner's claim that the decision of the Pennsylvania Supreme Court relied solely on Fourth Amendment grounds, that court's opinion clearly declares that Article I, Section 8 of the Pennsylvania State Constitution provides an

alternative, independent and adequate basis for its decision. Accordingly, this Court lacks jurisdiction to review this case. *Michigan v. Long*, *supra*.

Long holds that when a state court opinion is based upon federal law grounds, but also indicates clearly that it is alternatively based on separate, adequate and independent state law, the United States Supreme Court lacks jurisdiction to review the decision. *Long*, 463 U.S. at 1041. The issue is clearly jurisdictional in nature. Further, such an expression of alternative and independent state law grounds need only be made clear on the face of the opinion sought to be reviewed. Finally, in the face of such an expression, respect for the independence of state courts as well as the avoidance of rendering merely advisory opinions prevents the United States Supreme Court from undertaking review. *Id.* at 1039-1041; *see also Ohio v. Robinette*, 519 U.S. 33, 44 (1996).

Here, the Pennsylvania Supreme Court's Opinion contains a clear expression of adequate state law grounds independent from its interpretation of the Fourth Amendment, namely the well-settled recognition in Pennsylvania law that Article I, Section 8 of the Pennsylvania Constitution embodies a specific and strong notion of privacy not found within the Fourth Amendment. At the aforecited footnote 3 of its Opinion, the Pennsylvania Supreme Court noted that it need not address the Respondent's state constitutional challenge but chose to do so anyway, first, by enunciating the strong notion of privacy embodied in Article I, Section 8, which is greater than that provided for by the Fourth Amendment. In support of this portion of that Court's declaration, it cited *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991). *Edmunds* contains a thorough discussion of the unique history of Article I, Section 8 and the differences between that provision and the Fourth Amendment, demonstrating that long-standing Pennsylvania law has made it clear that Article I, Section 8 is unshakably

linked to a right of privacy guaranteed in Pennsylvania, notwithstanding federal cases to the contrary. *Id.*, 586 at 896-899.

The Pennsylvania Supreme Court then clearly declared its independent and separate state law grounds, stating: "Thus, given our conclusion that the within conduct violates the Fourth Amendment, it is clear that this conduct likewise violates Article I, Section 8." This brief but clear explanation on the face of the opinion in question meets this Court's threshold established in *Long* and makes clear that any review conducted by this Court could amount to nothing more than an advisory opinion[2] which is prohibited by *Long*. *Id.*, 463 at 1042; *Robinette*, 519 U.S. at 423-424. Accordingly, this Court lacks jurisdiction to undertake review of this case.

CONCLUSION

This Court lacks jurisdiction to review this case. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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2. This Court does have an opportunity to squarely address and determine the Fourth Amendment issue Petitioner herein wants reviewed. The case, *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), which raises this issue from a federal court venue and solely on federal grounds, is pending before this Court via a Petition for Writ of Certiorari at docket No. 99-8508.